

Responding to Catastrophic Casualties: Implications for the Insurance Industry



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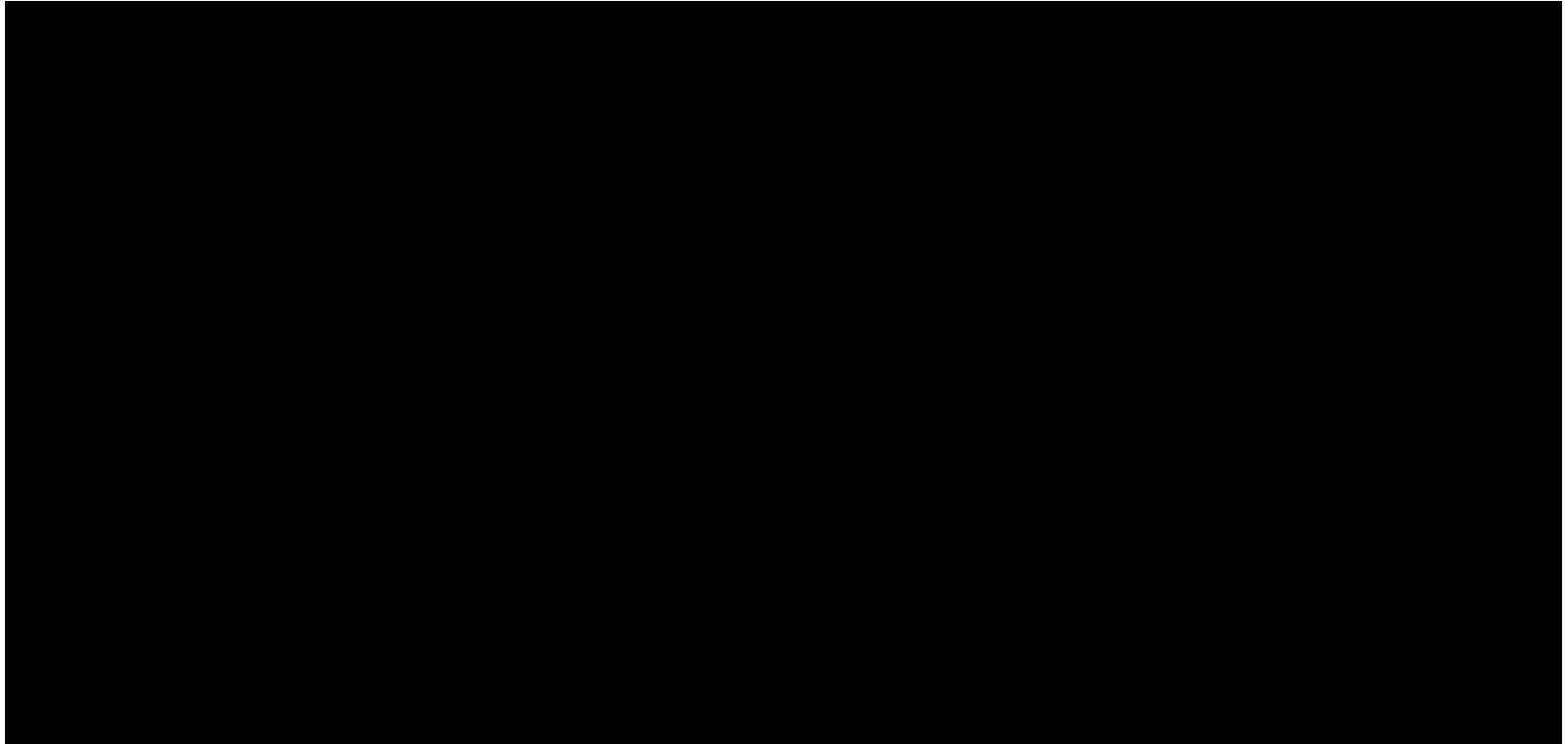
M/V SeaStreak Wall Street Allision



At about 8:45 a.m. on January 9, 2013, a 141' passenger ferry carrying 326 morning commuters and five crew members allided with Pier 11 at the foot of Wall St. in Manhattan.

Here's what happened next.....

The Media Onslaught



An ounce of prevention....

- Before the crisis...
 - Foster the personal relationship between the insurer and the insured when things are calm
 - Provide referrals to industry professionals and encourage relationships
 - Crisis communications experts
 - Marine surveyors
 - Attorneys
 - Encourage training
 - Media training
 - QI training
 - HAZWOPER training
 - Tabletop drills

Encourage and Support *Proactivity* and *Creativity* after the Occurrence

- **Support creativity in claims and case management**
 - Creativity when it comes to background checks and surveillance
 - Creativity when it comes to choosing experts
 - Don't make all decisions based upon cost
 - Sometimes it is worth it to spend
 - Sometimes the best experts are the cheapest
 - Creativity when it comes to claims management
 - Creativity when it comes to resolving claims prior to litigation
 - Creativity when it comes to settlements
 - Encourage clients/insureds to become directly involved in settlement process, and support that involvement
 - Think of creative alternatives/solutions for settlements
 - *E.g.*, Ferry tickets in Seastreak accident

- **Encourage clients/customers to get directly involved with settlement process, mediations...**

The Press

- **Purpose – to generate news**

- Multiple platforms competing for content: paper, TV, online, social media.
- Often do not accurately report the facts & are often unfamiliar with marine industry. So called legal experts have little or no background in marine matters.

- **Consider hiring a media consultant**

- They can prepare press releases, monitor good and bad press, and also assist in fact finding through social media outlets.

- **On balance, no corporate member should speak to the press**

- Company executives occasionally make a positive impact, but it is rare.

- **Consequences of statements to the press**

- We led off with the press to show that what you say in the press may adversely impact how companies are treated by the NTSB and USCG, and potentially the USDOJ.

The NTSB

- **Purpose – “The National Transportation Safety Board is an independent Federal agency charged by Congress with investigating every civil aviation accident the United States and significant accidents in other modes of transportation – railroad, highway, marine and pipeline.”**
 - Marine casualties are not a stated priority.
 - Marine capabilities have been limited in terms of personnel; appear to be enhancing marine capabilities
- **NTSB’s goal – to determine the probable cause of accident and issues safety recommendations aimed at preventing future accidents.**
 - The NTSB also carries out special studies concerning transportation safety and coordinates the resources of the Federal Government and other organizations to provide assistance to victims and their family members impacted by major transportation disasters.
 - The NTSB does not find fault; just probable cause.
- **Political body – The NTSB has five Board Members, each nominated by the President and confirmed by the Senate to serve 5-year terms. A Member is designated by the President as Chairman and another as Vice Chairman for 2-year terms.**
 - The NTSB, like all federal agencies, fights for federal dollars - need to justify their existence
 - Will, at times, be critical of the USCG and make recommendations to implement new rules and regulations.
- **The NTSB investigations team is called the “Go Team.”**
 - The Go Team begins the investigation of a major accident at the accident scene, assembling the broad spectrum of technical expertise that is needed to solve complex transportation safety problems.
 - The team can number from 3-4 to dozens of specialists from the Board’s HQ in Washington, D.C. → assigned on a rotational basis to respond as quickly as possible to the scene of the accident.
- **Party in interest nomination**
 - Beneficial designation because it provides access to information not provided to others.

The NTSB Investigation

- Restricts parties from independently investigating the incident.
- Will focus on SMS, safety culture, etc.
- Document requests
- Interviews of crew and employees
 - Corporate representative is permitted to attend interviews but witness is not entitled to a lawyer. A general counsel can attend the interview.
- Inspection of vessels, etc.
- Preliminary report.
 - NTSB will request input from parties in interest and are receptive to input from parties in interest.
 - Vital to have respected experts available to review the work of the NTSB. The NTSB will admit errors and change its report to insure accuracy.
- Public hearing.
 - Will generally hold a public hearing
 - May conduct jointly with the USCG → e.g., EL Faro MBI was a joint hearing with the NTSB reserving its rights to conduct its own hearing.

The USCG

▪ Purpose

- The primary mission of the Coast Guard's Office of Investigations and Casualty Analysis is to investigate marine casualties to determine their root cause(s) and use the information gathered in that process to prevent further casualties. In addition, other segments of the Coast Guard also investigate reports of negligence, misconduct, or other violations of federal laws or regulations that occur in conjunction with the operation of commercial vessels.
 - For example, the relevant Sectors pursue enforcement actions to prevent future deficiencies and non-compliance by issuing Letters of Warning and Notices of Violations, and may recommend the initiation of Administrative Civil Penalty hearings and suspension and revocation proceedings.

▪ Referrals to DOJ

- The USCG will be the agency that will refer the matter to the USDOJ if they believe a crime had been committed.

▪ Investigations

- Document request
- Interviews
- Inspections
- MBI public hearing – rare.

Litigation

■ Limitation of Liability

- When to file → sooner rather than later?
- Negative Press?
 - The news cycle is short; the benefits outweigh the short term bad press
 - The true narrative is that a limitation proceeding is a benefit to all

■ The Pros

- Pick the venue
- Control the litigation
- Take advantage of your maritime expertise - retain a law firm with different skill sets

■ Early resolution

- Be proactive
- Consult with others who have dealt with the same type of scenario
- Establish a strategy for resolving claims
 - Evaluate early settlement
 - Retain experts
- Consider criminal implications

Criminal Investigations after a Casualty

- Topics to be covered:
 - What prompts a criminal investigation?
 - Considerations for the Insurance Industry
 - Recognizing when a casualty may turn into a criminal investigation
 - Differences between civil and criminal matters
 - Risks to the insurer or club
 - Impact on claim investigations
 - Coverage questions
 - Responding in the immediate aftermath of a casualty
 - Shipboard investigation by gov't
 - Parallel investigation by counsel
 - Voluntary disclosures
 - After the initiation of a criminal investigation
 - Cooperation with investigation
 - Mitigating reputational damage

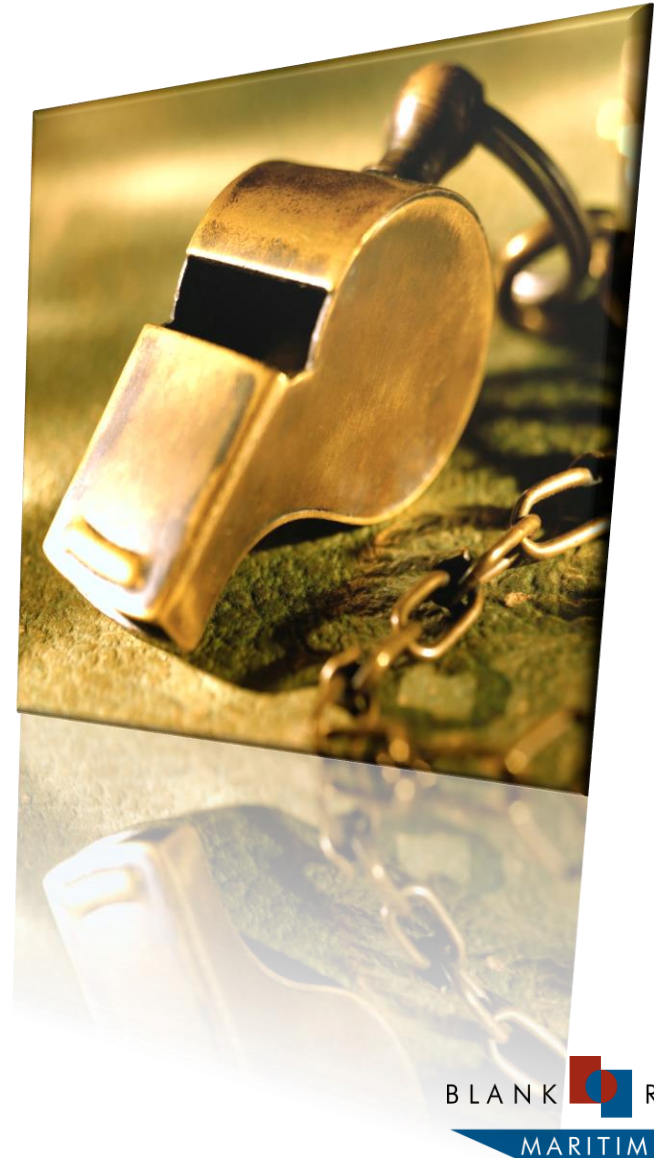
What Prompts a Criminal Investigation?

- **Criminal investigations arise from:**

- Whistleblowers
- Port State Control inspections
- Casualties/oil spills
- Other
 - Remote sensing
 - Int'l cooperation

- **New/on the horizon**

- VGP and ECA



Considerations for the Insurance Industry

- **Signals that a casualty may turn into a criminal investigation**
 - CGIS or other criminal investigators on site
 - Interviews or seizures of evidence
 - Warrantless seizures typically permitted, but need consent/warrant to search
 - Discharge or spillage of pollutants
 - Failure of pollution prevention equipment
 - Falsified or incomplete documents presented to authorities
 - Involvement of DOJ ECS or USAO
 - Search warrant at shoreside offices or RFPs/subpoenas
- **Differences between civil and criminal matters**
 - Risks to insured parties and insurers are different
 - Must not do anything to impede or obstruct investigation

Considerations (cont'd)

■ Risks to Insurers

- Preservation of records
- Cooperation with investigation

■ Impact on Claim Investigations/Cover

- Internal or claim investigation to determine coverage for response occurs parallel to penalty/criminal investigation being handled by counsel for insured
- Outside Counsel's investigation is typically covered until referral for criminal investigation
 - Discretionary cover is usually triggered upon referral
 - Determinations about reimbursement of defense costs and liabilities should wait until the end of the matter
- Recommend engaging counsel to interface with criminal counsel
 - Insured typically required to keep insurer informed if anticipates seeking discretionary cover
 - Avoid privilege waivers → common interest privilege
 - Counsel can provide on-going reporting → cost savings on the back end

Current Enforcement Trends

- Environmental Crimes
 - APPS – MARPOL Annexes I & V
 - Ballast Water/Gray Water
 - Clean Water Act
- Safety/Seaman's Manslaughter
 - Failure to report haz. condition
 - Criminal negligence
- Post-Incident Conduct
 - False statements
 - Obstruction of Justice



Immediate Response to a Casualty

■ Gov't Shipboard Investigation

- Interview officers and crew
- Seizures of evidence from ship

■ Parallel Investigation by Counsel

- Interview or debrief crew
- Collect and review records
- Preserve data
- Work with experts and technical managers
- Cooperate with USCG

■ Security Agreement

- COTP Order or Detention may be in place
- Enter agreement to ensure release of vessel and allow vessel to continue trading
- Surety bond and other conditions

■ Voluntary Disclosures

- Policy in Appendix to USCG Maritime Law Enforcement Manual
- Stringent terms → but can be flexible in reality
- Prompt (21 days) and full disclosure



After the Initiation of a Criminal Investigation

■ Referral to DOJ ECS or USAO

- Cooperation with investigation is imperative
- GJ Subpoenas/Testimony, Proffers, Etc.

■ Mitigating Reputational Damage

- Crisis management considerations arise as case moves towards plea agreement or indictment
- Prepare response to DOJ press release
- Carefully craft language of joint factual statement

- ***Engaging counsel early on will allow you to remain informed through the whole process and save time in the event you need to evaluate discretionary coverage.***

Questions?

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